TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 24

NANCY K. McFEELY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 16, 1935.

CERTIORARI GRANTED MAY 20, 1935.

SUPREME COURT OF THE UNITED STATES

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United States Board of Tax Appeals.

DOCKET NO. 69492.

NANCY K. McFEELY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances:
For Taxpayer: HARRY B. WASSELL, ESQ.;
For Commissioner: W. F. GIBBS, ESQ.

DOCKET ENTRIES.

Jan. 24, 1933. Petition received and filed. Taxpayer notified. (Fee paid.)

Jan. 24, 1933. Copy of petition served on General Counsel.

Mar. 25, 1933. Answer filed by General Counsel.

Mar. 31, 1933. Copy of answer served on taxpayer. General calendar.

Aug. 26, 1933. Hearing set Oct. 10, 1933.

Oct. 10, 1933. Hearing had before Mr. Smith on merits. Submitted. Stipulation of facts filed. Briefs none.

Oct. 16, 1933. Transcript of hearing of Oct. 10, 1933 filed.

Feb. 2, 1934. Findings of fact and opinion rendered, Charles P. Smith, Div. 5. Judgment will be entered for the respondent.

Feb. 6, 1934. Decision entered, Charles P. Smith, Div. 5.

Apr. 23, 1934. Petition for review by U. S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer.

Apr. 27, 1934. Proof of service filed by taxpayer.

June 12, 1934. Præcipe filed by taxpayer.

June 14, 1934. Proof of service of præcipe filed.

June 22, 1934. Order enlarging time to 7/31/34 for transmission and delivery of record entered.

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 69492.

Nancy K. McFeely,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

PETITION.

(Filed January 24, 1933.)

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:B-1:GLN-60D), dated December 16, 1932, and as a basis of his proceeding alleges as follows:

1. The petitioner, Nancy K. McFeely, an individual, is a citizen of Pennsylvania, residing at 703 Main Street, Latrobe, Westmoreland County, Pennsylvania.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on December 16, 1932.

3. The taxes in controversy are income taxes for the calendar year 1929 and for thirty-five thousand three hundred seventy-two dollars and fifty-three cents ($35,372.53) additional assessment.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in refusing the petitioner's claim that profit on the sale of 1000 shares of Radio A common stock and 150 shares of American Window Glass Machine Company common stock, the absolute title to which was acquired in 1925 represented capital net gain under the provisions of Section 101 of the Revenue Act of 1928.

(b) The Commissioner erred in determining a deficiency of approximately $35,372.53 by eliminating $394,685 reported by the petitioner as capital net gain, and adding $404,085 as ordinary net profit on sales of stock.

(c) The Commissioner erred in determining in this case that the date which governs for gain or loss purposes under Section 113 (a) (5) of the Revenue Act of 1928 should be used also for determining what are "capital assets" and "capital gain" thus setting aside the provisions of Section 101 of said act giving the taxpayer the benefit of her capital gain and loss.

(d) The Commissioner erred in determining in this case that the basis for gain or loss of the taxpayer's donor is governed by Section 113 (a) (5) of the Revenue Act of 1928 and that November 3, 1927, the date which under said section would have been the date of distribution to the donor, is the date which governs the determination of capital net gain or loss.

(e) The Commissioner erred in refusing to determine that there was a constructive distribution of the Estate of T. H. Given, deceased, on May 20, 1925, the date when administration was completed, and thereby fixing that date as the basis for determining capital gain or loss.

(f) The Commissioner erred in refusing to determine that the widow donor acquired at the date of the death of her husband an absolute title to her interest in his Estate by electing to take against his will in lieu of her dower interest under the laws of Pennsylvania, thereby fixing June 28, 1919, as the basis for determining capital gain or loss.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(1) Nancy K. McFeely, the taxpayer, became the owner of 3500 shares of Radio Corporation of America "A" common stock and 1050 shares of the common stock of the American Window Glass Machine Company, and in 1929 sold 1000 shares of the Radio and 1050 shares of the American Window Glass Machine Company stock for a net profit of $394,685. This stock was part of an absolute gift to her from her mother, made under assignment dated June 23, 1924, and August 1, 1925, of a one-tenth interest in one-half of the Estate of T. H. Given, deceased, the husband of the donor, Martha A. Given.

(2) On June 28, 1919, T. H. Given died, leaving his widow, Martha A. Given, and no issue.

(3) On July 3, 1919, his will, dated October, 1918, was filed and probated in the Register's Office of Allegheny County, Pennsylvania.

(4) On July 3, 1919, nothing having been left to her under the will, Martha A. Given filed with the

executors in writing her election under the laws of Pennsylvania to take against his will one-half of his estate in lieu of her dower, and as there were no issue she thereby became the absolute owner of one-half of his estate.

(5) On July 3, 1919, letters testamentary were issued to George C. Moore and Arthur E. Braun and they proceeded to administer the estate.

(6) On August 2, 1919, the executors filed an inventory and appraisement of the Estate of T. H. Given, deceased, in the Register's Office of Allegheny County, Pennsylvania.

(7) In July, 1923, the first and partial account was filed by the executors at No. 594 September Term, 1923, in the Orphans' Court of Allegheny County, and owing to the fact that all the claims against the estate had not been fully discharged, the audit was continued, although by agreemeent between the executors and the distributees, a partial distribution of assets was made on September 29, 1923, and again on December 20, 1924.

(8) On June 23, 1924, an absolute assignment was made by Martha A. Given to Harry B. Wassell, in trust for the taxpayer, Mrs. Nancy K. Feely, of ten per cent. of her one-half interest in the estate of T. H. Given, deceased.

(9) In March, 1925, Martha A. Given reported this gift at its value as of June 23, 1924—the date of the gift—and paid a gift tax thereon in the sum of $2417.90.

(10) On March 6, 1925, the executors of the Estate of T. H. Given filed a second and partial account as of January 31, 1925. This account was audited on May 20, 1925, and at the time of the audit as required

by law, the executors submitted a sworn statement to the effect that all creditors whose claims the accountants had notice or knowledge of before the filing of this account had been paid; that all Federal taxes had been paid and substantially all state taxes, and that the executors had ample funds to meet the balance claimed by the state when the amount was ascertained. No other claims were later presented.

(11) On May 20, 1925, the Orphans' Court decreed a partial distribution, recognizing the assignment of the interest to Nancy K. McFeely, the taxpayer, and delivering to Harry B. Wassell, as her trustee, among other items 2000 shares of Radio Corporation of America "A" common stock and 900 shares of American Window Glass Machine Company common stock. Delivery of the balance of the assets, including 1000 shares of Radio "A" common and 150 shares of American Window Glass Machine Company common stock was suspended until the filing of the final account, it being understood that the executors should continue to hold the assets in kind and distribute the income therefrom quarterly to the beneficiaries.

(12) On August 1, 1925, by instruments duly executed, the gift to Mrs. Nancy K. McFeely, the taxpayer, was made absolute, and all the stock already distributed was turned over to her.

(13) In August, 1927, a third and partial account was filed by the executors at No. 84 October Term, 1927, in the Orphans' Court of Allegheny County, showing the payment of current taxes from the time of filing the account in 1925 to July 31, 1927, and showing the distribution of the income received during this period on the stock and bonds held by the executors to the beneficiaries, including the petitioner.

(14) Under date of November 3, 1927, a further delivery of the assets was made and there were de-

livered to Mrs. Nancy K. McFeely, the taxpayer, among other assets 1000 shares of Radio "A" common stock and 150 shares of American Window Glass Machine Company common stock, the subject of this controversy.

(15) On March 14, 1929, Nancy K. McFeely, the petitioner, sold said 1000 shares of Radio "A" common stock, which were a part of said gift, for the sum of $484,460. This stock had been valued for gift tax purposes as of June 23, 1924, at $20,625, and thus showed a net gain of $463,835.

(16) On December 19, 1929, she also sold said 1050 shares of American Window Glass Machine Company common stock which were a part of said gift for the sum of $19,950. This stock had been valued for gift tax purposes as of June 23, 1924, at $89,100, and thus showed a net loss of $69,150.

(17) In March, 1930, the petitioner filed her 1929 income tax report and reported as capital net gain the net profit of $394,685 on said sales, upon which she paid a capital gain tax of $49,335.63. In said report she set up June 23, 1924, the date of the gift to her, as the date she had acquired the said property sold, and used its value as of that date in determining the capital net gain reported.

(18) The donee taxpayer acquired the absolute property right, including the right to delivery in the property sold, on June 23, 1924, and August 1, 1925, and held it for more than two years, bringing it clearly within the provisions of Section 101 (c) (8) defining "Capital Assets" entitling her to the benefit of the capital gain provisions.

(19) The Commissioner determined that the 1000 shares of Radio "A" common stock and 150 shares of American Window Glass Machine Company common

stock sold were not property acquired by the donee taxpayer until the delivery on November 3, 1927, by the executors, because the date which governs for gain or loss purposes under Section 113 (a) (2) for the donor must be used as the date for determining what constitutes "capital assets" and "capital gain" under Section 101 (c) (8) (B) for the donee taxpayer.

(20) The Commissioner determined that said stock so sold did not constitute "capital assets" and that the profit was ordinary net profit, and on December 16, 1932, notified your petitioner that he had determined her tax liability for the year 1929 disclosed a deficiency of approximately $35,372.53 arising out of said change to net profit from capital net gain.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and determine that the property sold consisted of capital assets; that the petitioner is entitled to the benefit of the capital net gain provisions of the Revenue Act of 1928 in computing her 1929 tax on the property sold, and that there is no deficiency due from the petitioner for the year 1929.

HARRY B. WASSELL,
Attorney for Petitioner.
3106 Grant Building,
Pittsburgh, Pa.

STATE OF PENNSYLVANIA,
COUNTY OF ALLEGHENY, } *ss.:*

NANCY K. MCFEELY, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

MRS. NANCY K. MCFEELY.

Subscribed and sworn to before me this twenty-first day of January, A. D. 1933.

JAS. T. HUGHES,
(Seal) *Notary Public.*
My commission expires April 13, 1935.

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Dec 16 1932

Mrs. Nancy K. McFeely,
c/o Harry B. Wassell,
3106 Grant Building,
Pittsburgh, Pennsylvania.

Madam:

You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $35,372.53, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.

By
(Signed) J. C. Wilmer
Deputy Commissioner.

Inclosures:
Statement
Form 882
Form 870

STATEMENT

IT:AR:B-1
GLN-60D

In re: Mrs. Nancy K. McFeely,
c/o Harry B. Wassell,
3106 Grant Building,
Pittsburgh, Pennsylvania.

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1929	$84,803.09	$49,430.56	$35,372.53

The report of the Internal revenue agent in charge at Pittsburgh, Pennsylvania, a copy of which was furnished you, has been reviewed and approved with the following exception:

The capital net loss on the sale of 150 shares of the American Window Glass Machine Company as shown by exhibit C of the agent's report was $174.75 and the loss on the sale of 900 shares of this stock as shown by exhibit D was $64,048.50, resulting in a total capital loss of $64,223.28 instead of $59,446.18 as shown by the agent's report.

The adjustments in your income and the computation of your income tax liability follow:

Net income reported on return, line 18		$15,456.15
Capital net gain		394,685.00
Total net income reported		$410,141.15
Add:		
1. Interest	$2,135.47	
2. Interest on tax-free bonds	1,110.00	
3. Profit on sales	404,085.00	
4. Dividends	5,625.81	
5. Error in addition	100.00	413,056.28
		$823,197.43
Less:		
6. Fiduciary income	$3,800.00	
7. Capital net gain	458,908.25	462,708.25
Adjusted net income		$360,489.18
Computation of Tax		
Total net income adjusted		$360,489.18
Plus:		
Capital net loss included		64,223.25
Ordinary net income adjusted		$424,712.43

Less:		
Dividends	$9,179.56	
Interest on Liberty bonds	218.34	
Personal exemption		
Personal exemption	3,500.00	12,897.90
Net income subject to normal tax		$411,814.53
Normal tax at ½% on $4,000.00		$20.00
Normal tax at 2% on $4,000.00		80.00
Normal tax at 4% on $403,814.53		16,152.58
Surtax on $424,712.43		76,602.49
Total		$92,855.07
Less:		
12½% of capital net loss	$64,223.25	8,027.91
Balance		$84,827.16
Less:		
Earned income credit	$1.87	
Tax paid at source	22.20	24.07
Income tax liability		$84,803.09
Tax previously assessed		49,430.56
Deficiency		$35,372.53

EXPLANATION OF CHANGES

1. The interest on bank deposits, notes, corporation bonds, etc. has been increased by $2,135.47 representing interest on bank deposits with the Peoples Pittsburgh Trust Company and interest on refund of Federal income tax not previously reported.

2. Interest of $1,110.00 on tax-free covenant bonds not originally reported has been included in your income.

3. The profit of $404,085.00 on the sale of 1,000 shares of Radio Corporation of America "A" has

been included in schedule 8. Your contention that the profit on the sale of this stock represented capital net gain under the provisions of Section 101 of the Revenue Act of 1928 for the reason that you acquired an absolute right in property of value in 1925 and sold such property in 1929, more than two years later, has been considered.

Section 101 (c) (8) (B) of the Revenue Act of 1928 provides as follows:

> "In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

It appears that the stock in question was acquired under an assignment by your mother of a portion of her interest in the Estate of T. H. Given and the basis for gain or loss purposes in accordance with section 113 (a) (2) of the Revenue Act of 1928 is the same as it would have been in your mother's hands. Therefore, the period during which your mother held the property should be added to the period it was held by you in order to determine the total period for which the particular property was held.

In this case, the decree of distribution of the stock was not made until November 3, 1927 and that date governs for gain or loss purposes under section 113 (a) (5) of the Revenue Act of 1928. In view of this fact it is inconsistent to hold that the stock was in your mother's hands prior to November 3, 1927, the date of the decree of distribution. That date which governs for gain or loss purposes, as the law specifically so provides, should be used also for capital gain pe-

termination. Since the Radio Corporation stock was sold on March 14, 1929, not having been held by you nor by the donor for a period of two years from November 3, 1927, the profit may not be considered capital net gain but is subject to both normal tax and surtax.

Careful consideration has been given the evidence furnished in your briefs and at conferences held in this office on March 17 and September 29, 1932, but no change can be made from the previous adjustment.

4. Dividends have been increased by $5,625.81 representing $3,657.06 received from the Estate of T. H. Given originally included in schedule 6 and $1,968.75, an understatement in the amount of dividends originally reported.

5. An error of $100.00 in addition of the income reported on your return has been corrected.

6. The amount of $3,800.00 included in schedule 6 as income from the Estate of T. H. Given has been eliminated and the correct amount of dividends is now included in the proper schedule.

7. The capital net gain of $394,685.00 has been eliminated and a loss of $64,223.25 allowed. This amount is the sum of the loss of $64,048.50 on the sale of 900 shares of stock of the American Window Glass Machine Company as shown in exhibit D and the loss of $174.75 the loss on the sale of 150 shares of American Window Glass Machine Company as shown by exhibit C of the agent's report.

Consent which will expire December 31, 1932, except as extended by the provisions of section 277 of the Revenue Act of 1928, is on file for the year 1929.

ANSWER.

(Filed March 25, 1933.)

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits that petitioner is an individual.

2. Admits that notice of deficiency was mailed to petitioner on December 16, 1932.

3. Admits that the taxes in controversy are income taxes for the calendar year 1929 in the amount of $35,372.53.

4. Denies that the Commissioner committed the errors alleged in subparagraphs (a) to (f), both inclusive, of paragraph 4.

5 (1) to (19). Denies the allegations of subparagraphs (1) to (19), both inclusive, of paragraph 5.

5 (20). Admits that in notice of deficiency dated December 16, 1932, profit on 1000 shares of "A" common stock of Radio Corporation of America, sold on March 14, 1929, was included in ordinary net income by reason of the fact that such stock was acquired by petitioner on November 3, 1927. Denies the remaining allegations of subparagraph (20) of paragraph 5.

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

FINDINGS OF FACT AND OPINION.

(Rendered February 2, 1934.)

UNITED STATES BOARD OF TAX APPEALS.

Nancy K. McFeely,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

DOCKET NO. 69492. PROMULGATED FEBRUARY 2, 1934.

On August 1, 1925, the petitioner was given by her mother a 10 per cent. interest in her share in the estate of T. H. Given, in process of administration. At that time the estate had on hand a large amount of securities and more than enough cash to pay its known or probable liabilities. The distributees had agreed to receive their shares in kind, which agreement was of record in court proceedings. On November 3, 1927, there were distributed to the petitioner 1000 shares of Radio "A" common stock which the petitioner sold on March 14, 1929, at a large profit. In her return for 1929 she reported the profit as capital net gain. The respondent taxed it as other profit, upon the ground that the shares had been held by the petitioner for a period of less than two years. *Held*, that the gain is taxable as other gain on sales of property held for a period of less than two years.

Harry B. Wassell, Esq., for the petitioner;
W. F. Gibbs, Esq., for the respondent.

This proceeding is for the redetermination of a deficiency in income tax for 1929 in the amount of $35,372.53. The questions in issue are:

(1) Whether the profit realized by the petitioner from the sale of 1000 shares of Radio "A" common

stock was a "capital net gain" or "ordinary net income."

(2) Whether the respondent erred in refusing to determine a constructive distribution of the estate of T. H. Given on May 20, 1925, and thereby establish that date as the date of acquisition by the petitioner of the stock sold.

(3) Whether the Commissioner erred in refusing to determine that the widow-donor acquired at her husband's death on June 28, 1919, an absolute title to her interest in the estate by her election to take against his will in lieu of her dower interest and thereby establish that date as the date of acquisition by the petitioner of the stock sold.

FINDINGS OF FACT.

1. On June 28, 1919, T. H. Given died, leaving his widow, Martha A. Given, and no issue.

2. On July 3, 1919, the will of T. H. Given was filed and probated in the register's office of Allegheny County, Pennsylvania. Martha A. Given was not mentioned in the will.

3. On July 3, 1919, Martha A. Given filed with the executors her election in writing to take against the will of her husband, T. H. Given, one-half of his estate in lieu of her dower under the laws of Pennsylvania. This election was duly filed and recorded in the recorder's office of Allegheny County. The Orphans' Court of Allegheny County recognized her election and she was duly awarded one-half of the estate under the laws of Pennsylvania.

4. On July 3, 1919, letters testamentary were issued to George C. Moore and Arthur E. Braun, and they proceeded to administer the estate.

5. On August 2, 1919, an inventory and appraisement of the estate of T. H. Given was filed in the register's office of Allegheny County by the executors.

6. In July, 1923, a first and partial account was filed by the executors of the estate of T. H. Given, deceased, at No. 594 September Term, 1923, in the Orphans' Court of Allegheny County. An audit of this account was continued as all the debts of the estate were not paid and the estate was not fully administered.

7. On July 23, 1924, an assignment was made by Martha A. Given to Harry B. Wassell in trust for Nancy K. McFeely of 10 per cent. of her one-half interest in the estate of T. H. Given. This instrument declared that:

> The said Harry B. Wassell, or his successor in trust, to collect, receive and hold the said interest in said estate in trust for the uses and purposes and with the powers following:
>
> In Trust to pay over from time to time the net income therefrom unto the daughter of said Martha A. Given, Mrs. Nancy McFeely, for and during all the term of her natural life, without being subject to debts, engagements or liabilities but freed and discharged therefrom, and without right of anticipation.
>
> In trust upon the death of Mrs. Nancy McFeely before me to pay over the principal and any unexpended balance of any income therefrom to such of my heirs as shall then be designated by me in writing.
>
> In trust upon the death of Mrs. Nancy McFeely after my death then to pay over the principal and any unexpended balance of any income thereof in the manner directed by me in my last Will and Testament, or if not so directed by me then to her nearest relative of my blood.

The validity of this assignment was recognized by the Orphans' Court and distribution decreed thereunder.

8. On March 16, 1925, Martha A. Given reported the gift to her daughter Nancy K. McFeely at its value as of June 23, 1924, the date of the gift, and paid a gift tax thereon in the sum of $2417.90.

9. On March 6, 1925, a second and partial account of the estate of T. H. Given was filed at No. 301 April Term, 1925, in the Orphans' Court of Allegheny County. At the audit of this account on May 20, 1925, the executors, under rule of court, filed a sworn statement representing, *inter alia:*

> (c) All creditors whose claims the accountants had notice or knowledge of before filing this account have been paid.
>
> (d) The estate is subject to the payment of direct and collateral inheritance taxes to the State of Pennsylvania and the payment of Federal Inheritance Tax. All Federal taves have been paid and substantially all state tax; but a balance claimed by the state is under negotiation which when ascertained, the Executors have ample funds to meet.
>
> . . . . . .
>
> (h) The names of all persons having any interest in the estate as legatees, heirs or next of kin, are as follows:
>
> Martha A. Given, widow, of full age;
>
> Arthur E. Braun and George C. Moore, Trustees for Annie Given Kerr (life tenant), of full age;
>
> Arthur E. Braun and George C. Moore (in remainder), of full age.
>
> (l) The property to be distributed under this account consists of stocks, bonds and cash and the parties in interest have elected to accept the same in kind; an agreement in respect thereto executed

by all the parties in interest is attached hereto, marked Exhibit "F". Under the said agreement, a portion of the securities and cash shown in this account shall be held by the executors and distribution thereof suspended until the filing of a final account.

On May 20, 1925, the Orphans' Court made the following decree:

> And now, to-wit, May 20, 1925, the accounts in this case having been filed and confirmed *nisi*, and having been examined by the Court, upon consideration thereof it is decreed that said accounts be confirmed absolutely, and it appearing that an agreement by the distributees has been filed providing for distribution of a portion of the fund in the hands of the Accountants, in kind, and distribution of the remainder to be suspended until the filing of a final account, it is ordered that the fund in the hands of the Accountants, to wit, $2,731,772.78, be paid in accordance with the schedule of distribution hereto attached and made part hereof, unless exceptions be filed within ten days, or on appeal be taken herefrom within three weeks.

Under this decree, Harry B. Wassell, as trustee for Nancy K. McFeely, received, *inter alia*, 900 shares of American Window Glass Machine Co. common stock. No further sale of assets was made by the executors and all of the stocks and bonds making up the remainder were later delivered in kind to the parties entitled thereto.

11. On August 1, 1925, an agreement was made and entered into by and between Martha A. Given, donor, and Nancy K. McFeely, donee, and Nancy K. McFeely as trustee, which provided in material parts as follows:

> Whereas, by assignment dated June 23rd, 1924, a copy of which is attached hereto, Martha A. Given conveyed to Harry B. Wassell, ten (10%) per cent. of all her right, title and interest in the Estate of Thomas Hartley Given, deceased, to be

collected by the said Harry B. Wassell and held in trust for Mrs. Nancy McFeely under the terms and conditions set forth in said assignment, and

WHEREAS, the said Harry B. Wassell has pretented his resignation as said Trustee and the said Martha A. Given has appointed Mrs. Nancy McFeely as his successor Trustee under the provisions of said instrument, copies of which resignation and appointment are hereto attached, and

WHEREAS, the said Martha A. Given, as the Donor, desires to give to the said Mrs. Nancy McFeely, in addition to the life interest already held by her in said trust, the absolute title and interest therein, and the said Mrs. Nancy McFeely desires to acquire absolutely all said property in which she now has a life interest.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That for One ($1.00) Dollar and other good and valuable considerations, to her in hand paid by the said Mrs. Nancy McFeely, it is agreed by and between the parties hereto as follows:

The said Martha A. Given, as Donor, agrees to the termination of said trust and to the transfer and conveyance to Mrs. Nancy McFeely, the present holder of the life interest therein, of the absolute right, title, interest, property, claim and demand of, in and to the said ten (10%) percent. interest in the Estate of Thomas Hartley Given, deceased, as and when collected for her by the said Harry B. Wassell, so that the said Mrs. Nancy McFeely shall then have and receive absolute title to said property, relieved of the conditions and provisions of said trust.

The said Mrs. Nancy McFeely, as Donee of said life interest and Trustee of said Trust estate, does hereby agree to the termination of said trust and to the transfer and conveyance to her absolutely of the said ten (10%) percent. interest in the Estate of Thomas Hartley Given, deceased, as and when collected by the said Harry B. Wassell.

On the same date Harry B. Wassell resigned as trustee of the estate created for Nancy K. McFeely by assignment of Martha A. Given dated June 23, 1924, and Martha A. Given by a separate instrument appointed Nancy K. McFeely to fill the vacancy caused by the resignation of Harry B. Wassell as trustee. The validity of these instruments was thereafter recognized by the Orphans' Court in making distribution thereunder.

12. On August 5, 1927, the third and partial account of the estate of T. H. Given was filed by the executors at #84 October Term, 1927, in the Orphans' Court of Allegheny County showing a balance of stocks, bonds, and cash, after distribution of May 20, 1925, of $1,339,108.93 (as per exhibit #6 attached to the stipulation).

13. On November 3, 1927, a further delivery of assets upon which distribution had been suspended was ordered and Nancy K. McFeely received, among other assets, certificates for 1,000 shares of Radio "A" common stock and 150 shares of American Window Glass Machine Co. common stock.

14. On March 14, 1929, Nancy K. McFeely sold the said 1,000 shares of Radio "A" stock which were a part of the gift for the sum of $484,460. This stock had been valued for gift tax purposes as of June 23, 1924, at $20,625, showing a net gain of $463,835.

15. On December 19, 1929, Nancy K. McFeely sold the said 1,050 shares of American Window Glass Machine Co. common stock which were a part of the gift for the sum of $19,950. This stock had been valued for gift tax purposes as of June 23, 1924, at $89,100, showing a net loss of $69,150.

16. In March 1930 Nancy K. McFeely filed her 1929 income tax return, claiming and reporting as

capital net gain a net profit of $394,685 on the sale of the Radio "A" common stock and American Window Glass Machine Co. common stock, upon which she paid a capital gain tax of $49,335.63. In such return she set up June 23, 1924, as the date she had acquired the property sold and used its value as of that date in determining the capital gain reported.

17. The respondent determined that there was a capital net loss on the sale of 150 shares of American Window Glass Machine Co. common stock of $174.75 and a capital net loss on the sale of 900 shares of this stock of $64,048.50, or a total capital loss of $64,223.25 as claimed by Nancy K. McFeely in her 1929 income tax return.

18. The respondent determined that there was an ordinary profit of $404,085 on the sale of 1,000 shares of Radio "A" common stock instead of a capital net gain of $463,835 as claimed by Nancy K. McFeely in her 1929 return. November 3, 1927, was used by the respondent as the basic date for his determination of gain or loss on the sale of 1,000 shares of Radio "A" common stock and 150 shares of American Window Glass Machine Co. common stock.

OPINION.

SMITH: The question presented by this proceeding is the amount of taxable profit realized by the petitioner from the sale of 1,000 shares of Radio "A" common stock on March 14, 1929, for the sum of $484,460, and whether the profit realized was a capital net gain or ordinary net income. The petitioner contends that, whatever the amount of the profit, it was a capital net gain within the meaning of the statute, and the respondent contends that it was ordinary net profit and not taxable under the capital net gain provisions of the statute. The contentions of the respondent are

set forth in his deficiency notice to the petitioner under date of December 16, 1932, as follows:

> 3. The profit of $404,085.00 on the sale of 1,000 shares of Radio Corporation of America "A" has been included in schedule 8. Your contention that the profit on the sale of this stock represented capital net gain under the provisions of Section 101 of the Revenue Act of 1928 for the reason that you acquired an absolute right in property of value in 1925 and sold such property in 1929, more than two years later, has been considered.

Section 101 (c) (8) (B) of the Revenue Act of 1928 provides as follows:

> "In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

It appears that the stock in question was acquired under an assignment by your mother of a portion of her interest in the Estate of T. H. Given and the basis for gain or loss purposes in accordance with section 113 (a) (2) of the Revenue Act of 1928 is the same as it would have been in your mother's hands. Therefore, the period during which your mother held the property should be added to the period it was held by you in order to determine the total period for which the particular property was held.

In this case, the decree of distribution of the stock was not made until November 3, 1927 and that date governs for gain or loss purposes under section 113 (a) (5) of the Revenue Act of 1928. In view of this fact it is inconsistent to hold that the stock was in your mother's hands prior to

November 3, 1927, the date of the decree of distribution. That date which governs for gain or loss purposes, as the law specially so provides, should be used also for capital gain determination. Since the Radio Corporation stock was sold on March 14, 1929, not having been held by you nor by the donor for a period of two years from November 3, 1927, the profit may not be considered capital net gain but is subject to both normal tax and surtax.

Section 101 of the Revenue Act of 1928, so far as is material to our determination, is as follows:

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

. . . . . .

(c) *Definitions.*—For the purposes of this title—

. . . . . .

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business) . . . For the purposes of this definition—

. . . . . .

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from

a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

Section 113 of the same act provides in material part as follows:

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

. . . . . .

(2) GIFT AFTER DECEMBER 31, 1920.—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

. . . . . .

(5) PROPERTY TRANSMITTED AT DEATH.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market

value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

It will be noted from our findings that T. H. Given died testate on June 28, 1919. In his will he made no provision for his widow. The widow, on July 3, 1919, elected to take, against the will of her deceased husband, one half of his estate in lieu of her dower under the laws of Pennsylvania. By virtue of such election one half of the estate of her deceased husband vested in her immediately and absolutely. *Re Greiner's Appeal,* 103 Pa. 89. It was not, however, one half of the specific assets of the estate which became her property by virtue of the election, but only one half of the estate after the debts and other charges of administration should be paid. The basis for determining the gain or loss upon the sale in 1929 of personal property acquired by the widow, Martha A. Given, from the estate of her deceased husband was the value thereof at the date of distribution to her. Section 113 (a) (5), Revenue Act of 1928; *Ralph W. Harbison,* 26 B. T. A. 896.

The petitioner contends that there was a constructive distribution of the estate of T. H. Given on May 20, 1925; that in legal effect the 1,000 shares of Radio "A" common stock were distributed to Martha A. Given on that date and that Martha A. Given was the owner of them until they were given to the petitioner by virtue of the agreement of August 1, 1925;

that by virtue of section 101 (c) (8) (B) the time during which the securities were in the ownership of Martha A. Given should be added to the time during which the ownership was in the petitioner for the purpose of determining whether the profit realized upon the sale on March 14, 1929, was capital net gain or ordinary net income.

In our opinion the evidence does not support the contentions of the petitioner. While the shares of stock were in the custody of the executors of the estate of T. H. Given they were not in any proper sense "held" by the petitioner. If the executors by agreement of the parties or otherwise had sold the shares and realized a profit therefrom the profit would unquestionably have been taxable to the estate and not to the beneficiaries. *Anderson v. Wilson,* 289 U. S. 20.

It seems clear that if Martha A. Given had not assigned any portion of her estate to the petitioner, but had received the 1,000 shares of Radio stock in question on November 3, 1927, and had sold them on March 14, 1929, the profit would have constituted ordinary net income and would have been taxable accordingly, for she would have held them for a period of less than two years at date of sale. Section 113 (a) (5). We can not see that the petitioner stands in any better position than her donor.

Conceivably, if in 1929 the petitioner had sold, not the 1,000 shares of Radio stock in question, but her interest in the estate of T. H. Given, the profit would have constituted capital gain; for she acquired that interest by gift from her mother on August 1, 1925, and would have owned it for a period of more than two years at date of sale. But she did not sell the gift *res* or a fractional part of it. She sold shares of stock which were distributed to her by the executors of the estate on November 3, 1927. Prior to that date the dominion and control over the shares were in the

executors of the estate and not in the petitioner. In view of these facts we think that it can not be said that the petitioner held them for a period of two years at the date of sale. *Johnson v. Commissioner* (C. C. A., 3d Cir.), 52 Fed. (2d) 726; *Schoenberg v. Burnet* (App. D. C.), 55 Fed. (2d) 543. *Contra, New York Trust Co., etc. v. Commissioner* (C. C. A., 2d Cir.), —— Fed. (2d) —— (Dec. 18, 1933). The respondent's contention on this point is sustained.

No contention is made by the petitioner as to the value of the 1,000 shares of Radio "A" common stock at the basic date, claimed by the respondent to be November 3, 1927. In the absence of evidence showing error on the part of the respondent in his determination, his valuation is approved.

Reviewed by the Board.

Judgment will be entered for the respondent.

DECISION.

(Entered February 6, 1934.)

Pursuant to the determination of the Board, as set forth in its report promulgated February 2, 1934, it is

ORDERED and DECIDED: That there is a deficiency of $35,372.53 for the year 1929.

(Sgd.) CHARLES P. SMITH,
Member.

PETITION OF NANCY K. McFEELY FOR REVIEW BY THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE THIRD CIRCUIT OF A DECISION BY THE UNITED STATES BOARD OF TAX APPEALS.

(Filed April 23, 1934.)

Nancy K. McFeely, the petitioner in this cause, by H. B. Wassell, counsel, hereby files her petition for a review by the Circuit Court of Appeals of the United States for the Third Circuit of the decision by the United States Board of Tax Appeals entered February 6, 1934, determining a deficiency of $35,372.53, in the petitioner's Federal Income Tax for the year 1929, and respectfully represents:

I.

The petitioner, Nancy K. McFeely, an individual, is a citizen of Pennsylvania, residing at 703 Main Street, Latrobe, Westmoreland County, Pennsylvania.

II.

NATURE OF THE CONTROVERSY.

The controversy involves generally the proper determination of the petitioner's liability for Federal income tax for the year 1929, and particularly whether profit on the sale of certain stocks was "capital net gain" or "ordinary net income."

The petitioner acquired title by gift from her mother, Martha A. Given, under assignments dated June 23, 1924, and August 1, 1925, to one-twentieth of the Estate of T. H. Given, deceased. A gift tax was assessed and paid on the specific assets comprising this gift by Mrs. Given on March 16, 1925. The estate had been administered by May 20, 1925, all debts having been paid, and the executors were holding under agreement the assets in kind pending delivery to the

parties entitled thereto. The petitioner and the other parties in interest, under said agreement to take in kind filed in the Orphans' Court, permitted the executors to retain the certificates evidencing the title to the stocks after May 20, 1925, and certain certificates were not delivered to her until November 3, 1927. Petitioner sold certain stock on March 14, 1929, which was over four years after she acquired title by gift but less than two years after delivery of the certificates.

Petitioner claimed that property sold was "capital assets" and the profit "capital gain," the date of the gift governing its determination as "capital assets."

Respondent held that the date of delivery of the certificates was the proper date for determining gain or loss, and it would be inconsistent to recognize the date of gift as the date governing the determination of capital assets; and therefore the profit was "ordinary net income."

The Board upholding the respondent held that although the petitioner could have sold the entire gift and the profit would have constituted "capital gain" nevertheless a sale at a profit of a specific portion of the gift would not constitute "capital gain" because the certificates evidencing the title of that specific portion had not been delivered to and held by your petitioner for more than two years.

III.

The petitioner being aggrieved by the conclusions of law contained in the opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Third Circuit.

IV.

ASSIGNMENTS OF ERROR.

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

(1) The determination that the profit realized by the petitioner from the sale of 1000 shares of Radio "A" common stock was "ordinary net income" and not "capital net gain."

(2) The determination that capital gain from the sale of capital assets under the requirements of Section 101 is reduced to "ordinary net income" because the basis of determining the gain as prescribed by Section 113 (a) (5) sets a date over two years after the date of the actual acquisition of the capital assets.

(3) The determination that the date which governs for gain or loss purposes in Section 113 (a) (5) of the Revenue Act of 1928 must be used in fixing the date of acquisition for capital gain determination under Section 101 (8) of said act, thereby voiding any previous holding period.

(4) The determination that the petitioner's basis for "capital gain or loss" in the sales in question was limited, reduced and restricted by Section 113 (a) (5) of the Revenue Act of 1928, and that November 3, 1927, is the date which governs the determination of capital net gain or loss.

(5) The refusal to determine a constructive distribution of the Estate of T. H. Given, deceased, on May 20, 1925, and to thereby establish that date as the date of acquisition by the petitioner of the stock sold, and thus determine the profit to be "capital net gain."

(6) The refusal to determine that, after the donor had acquired at her husband's death on June 28, 1919, an absolute title to her interest in his estate by her election to take against his will in lieu of her dower interest, her basis for determining capital gain or loss was June 28, 1919, and not the basis set up in Section 113 (a) (5) of the Revenue Act of 1928, and thereby

establish that date as the date governing the nature of the profit made by the petitioner on the stock sold.

(7) The Board erred in holding that although the profit on the sale by delivery of the equitable title would be capital gain, nevertheless, the sale by the delivery of the legal title to the same property would not be capital gain because the evidence of the legal title had not been held more than two years.

(8) The finding of the deficiency for the year 1929 of $35,372.53, in lieu of a determination that there was no additional income tax due from the petitioner for the year in controversy.

H. B. WASSELL,
Counsel for Petitioner,
3106 Grant Building,
Pittsburgh, Penna.

STATE OF PENNSYLVANIA,
COUNTY OF ALLEGHENY, } *ss.:*

H. B. WASSELL, being first duly sworn, says that he is counsel of record in the above-named cause; that as such he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

H. B. WASSELL.

Sworn to and subscribed before me this twentieth day of April, 1934.

LEO J. AARON,
(Seal) *Notary Public.*
My commission expires March 2, 1937.

STIPULATION OF FACTS.

(Filed October 10, 1933.)

It is stipulated and agreed between counsel for Nancy K. McFeely, petitioner, and counsel for the Commissioner of Internal Revenue, respondent, that the following facts are to be considered by the Board of Tax Appeals in the above-entitled case:

(1) June 28, 1919, T. H. Given died leaving his widow, Martha A. Given, and no issue.

(2) July 3, 1919, the will of T. H. Given was filed and probated in the register's office of Allegheny County, Pennsylvania. Martha A. Given was not mentioned in the will.

(3) July 3, 1919, Martha A. Given filed with the executors her election in writing to take against the will of her husband, T. H. Given, one-half of his estate in lieu of her dower under the laws of Pennsylvania. This election was duly filed and recorded in the recorder's office of Allegheny County, Pennsylvania, in Deed Book, Volume 2010, page 193. The Orphans' Court of Allegheny County recognized her election and she was duly awarded one-half of the estate under the laws of Pennsylvania.

(4) July 3, 1919, letters testamentary were issued to George C. Moore and Arthur E. Braun, and they proceeded to administer the estate.

(5) August 2, 1919, an inventory and appraisement of the Estate of T. H. Given was filed in the register's office of Allegheny County, Pennsylvania, by the executors.

(6) In July, 1923, a first and partial account was filed by the executors of the Estate of T. H. Given, deceased, at No. 594, September Term, 1923, in the Or-

phans' Court of Allegheny County, Pennsylvania. An audit of this account was continued as all the debts of the estate were not paid and the estate was not fully administered.

(7) June 23, 1924, an assignment was made by Martha A. Given to Harry B. Wassell, in trust for Mrs. Nancy K. McFeely, of 10 per cent. of her one-half interest in the Estate of T. H. Given. A true copy of said assignment being attached hereto as Exhibit No. 1. The validity of this assignment was recognized by the Orphans' Court and distribution decreed thereunder.

(8) March 16, 1925, Martha A. Given reported the gift to her daughter, Mrs. Nancy K. McFeely, at its value as of June 23, 1924, the date of the gift, and paid a gift tax thereon in the sum of $2417.90. This is of record in the United States Board of Tax Appeals in the case of Martha A. Given v. Commissioner of Internal Revenue, Docket No. 38236.

(9) March 6, 1925, a second and partial account of the Estate of T. H. Given was filed at No. 301, April Term, 1925, in the Orphans' Court of Allegheny County, Pennsylvania. At the audit of this account on May 20, 1925, the executors under Rule of Court filed a sworn statement representing, inter alia:

> "(c) All creditors whose claims the accountants had notice or knowledge of before filing this account have been paid.
>
> "(d) The estate is subject to the payment of direct and collateral inheritance taxes to the State of Pennsylvania and the payment of Federal Inheritance Tax. All Federal taxes have been paid and substantially all state tax; but a balance claimed by the state is under negotiation which when ascertained, the Executors have ample funds to meet.

"(1) The property to be distributed under this account consists of stocks, bonds and cash and the parties in interest have elected to accept the same in kind; an agreement in respect thereto executed by all the parties in interest is attached hereto, marked Exhibit "F". Under the said agreement, a portion of the securities and cash shown in this account shall be held by the executors and distribution thereof suspended until the filing of a final account."

A true copy of the executors' statement is attached hereto and marked Exhibit No. 2.

(10) May 20, 1925, the Orphans' Court decreed that $2,731,722.78 of the assets be paid and distribution of the remainder be suspended until the filing of a final account. Under this decree, Harry B. Wassell, as trustee for Mrs. Nancy K. McFeely, received inter alia, 900 shares of American Window Glass Machine Company common stock. A true copy of the decree is attached hereto, marked Exhibit No. 3. No further sale of assets was made by the executors, and all of the stocks and bonds making up the remainder were later delivered in kind to the parties entitled thereto.

(11) August 1, 1925, by instruments duly executed, the gift to Nancy K. McFeely was made absolute, true copies of said instruments being attached hereto as Exhibits No. 4 and No. 5. The validity of these instruments was thereafter recognized by the Orphans' Court in making distribution thereunder.

(12) August 3, 1927, the third and partial account of the Estate of T. H. Given was filed by the executors at No. 84 October Term, 1927, in the Orphans' Court of Allegheny County, Pennsylvania, showing a balance of stocks, bonds and cash, after distribution of May 20, 1925, of $1,339,108.93, as per Exhibit No. 6, attached hereto, which is a true copy of Schedules L, M, N and O.

(13) November 3, 1927, a further delivery of assets upon which distribution had been suspended was ordered, and Mrs. Nancy K. McFeely received among other assets certificates for 1000 shares of Radio "A" common stock, and 150 shares of American Window Glass Machine Company common stock. A true copy of the decree is hereto attached and marked Exhibit No. 7.

(14) March 14, 1929, Nancy K. McFeely sold the said 1000 shares of Radio "A" stock which were a part of said gift for the sum of $484,460. This stock had been valued for gift tax purposes as of June 23, 1924, at $20,625, showing a net gain of $463,835.

(15) December 19, 1929, Nancy K. McFeely sold the said 1050 shares of American Window Glass Machine Company common stock which were a part of said gift for the sum of $19,950. This stock had been valued for gift tax purposes as of June 23, 1924, at $89,100, showing a net loss of $69,150.

(16) In March, 1930, Nancy K. McFeely filed her 1929 Income Tax Report claiming and reporting as capital net gain a net profit of $394,685 on the sale of said Radio "A" common stock and American Window Glass Machine Company common stock, upon which she paid a capital gain tax of $49,335.63. In said report she set up June 23, 1924, the date of the gift to her, as the date she had acquired said property sold, and used its value as of that date in determining the capital gain reported. A true copy of said report is hereto attached as Exhibit No. 8.

(17) February 20, 1932, consent fixing the period of limitation upon assessment of 1929 Income and Profit Tax as of December 31, 1932, was filed by Nancy K. McFeely.

(18) The Commissioner determined that there was a capital net loss on the sale of 150 shares of American Window Glass Machine Company common stock of $174.75, and a capital net loss on the sale of 900 shares of this stock of $64,048.50, or a total capital loss of $64,223.25, instead of $69,150, as claimed by Nancy K. McFeely, in her 1929 tax report.

(19) The Commissioner determined that there was an ordinary profit of $404,085 on the sale of 1000 shares of Radio "A" common stock instead of a capital net gain of $463,835 as claimed by Nancy K. McFeely in her 1929 report. November 3, 1927, was used by the Commissioner as the basis for his determination of gain or loss on 1000 shares of Radio and 150 shares of American Window Glass Machine Company.

(20) December 16, 1932, the Commissioner notified petitioner that the determination of her tax liability for the year 1929 disclosed a deficiency of $35,372.53 arising principally out of said change from capital net profit to ordinary net profit.

H. B. WASSELL,
Counsel for Petitioner.
E. BARRETT PRETTYMAN,
Counsel for Respondent.

EXHIBIT NO. 1.

ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS

WHEREAS, Thomas Hartley Given, late of Pittsburgh, Penna., died on the 28th day of June, 1919, seized and possessed of certain real and personal estate having first made and published his last Will and

Testament, which was duly probated, registered and recorded in the Register's Office of Allegheny County, Pennsylvania, in Will Book Vol. 155, page 603, and

WHEREAS, Arthur E. Braun and George C. Moore, who were appointed executors of said Will, duly proved the same and took upon themselves the execution thereof, and

WHEREAS, Martha A. Given, widow of the said Thomas Hartley Given, deceased, by an election dated the 3rd day of July, 1919, and duly delivered to the said executors and recorded in the Recorder's Office of Allegheny County in Deed Book Vol. 2010, page 193, and duly filed with the Clerk of the Orphans' Court of Allegheny County, has elected to take against the Will of said decedent and is thereby entitled to receive and collect from said executors one-half of the estate of said Thomas Hartley Given.

NOW THEREFORE, for One ($1.00) Dollar and other good and valuable consideration unto her in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said Martha A. Given has granted, bargained, sold, released, conveyed, assigned, transferred and set-over and by these presents does grant, bargain, sell, release, convey, assign, transfer and set-over unto Harry B. Wassell, his heirs and assigns, Ten (10%) per cent of all her right, title and interest, property, claim and demand of every kind and nature whatsoever in law or equity, vested or contingent, of, in and to the estate, real and personal of Thomas Hartley Given aforesaid, late of Pittsburgh, Pa., deceased, to which she is entitled by law as his widow, whether payable now or at any time hereafter, and whether the same be vested or contingent, and to all and every or any part thereof as the same shall or may become due and payable by and

under the laws of Pennsylvania or the United States or in any other way whatsoever.

To Have and to Hold the premises hereby granted, conveyed and assigned with the appurtenances unto the said Harry B. Wassell, his heirs, successors and assigns forever.

And the said Martha A. Given, for herself and for her heirs, executors and administrators does by these presents covenant with the said Harry B. Wassell, his heirs and assigns, against all claimants the said premises and every part thereof to Warrant and Defend.

And the said Martha A. Given does hereby severally nominate, constitute and appoint said Harry B. Wassell, his executors or administrators, her true and lawful attorney, irrevocable, with full power of substitution of other attorneys, to ask, demand, sue for, recover and receive, the said interest, property, claim and demand of, in and to the estate hereinbefore particularly set forth, from the said executors or from any other person or persons whatsoever, and to compound, release, acquit and discharge the same and every or any part or parcel thereof, and upon receipt of the same or any part thereof acquittances and other proper discharges to make, and generally for her and in her name or in the names of her executors or administrators, to make, do, perform, and execute all and every such further acts, matters and other things requisite or necessary and that as fully as the said Martha A. Given, or her executors or administrators, could or might have done, hereby ratifying and confirming all and whatever he or they shall lawfully do or cause to be done in or about the premises by virtue hereof.

And the said Martha A. Given, for herself, and for her heirs, executors and administrators, does hereby covenant with the said Harry B. Wassell, his heirs and assigns, that she and her heirs, executors, administrators and assigns, at the request and at the charges of

the said Harry B. Wassell, his heirs and assigns, shall and will from time to time execute and acknowledge and deliver and cause to be executed, acknowledged and delivered, all and any such further conveyances and instruments in writing for the better assuring to the said Harry B. Wassell, his heirs and assigns, of the premises and interest in said estate as above conveyed or intended to be conveyed, as the said Harry B. Wassell, his heirs and assigns shall reasonably advise and acquire.

The said Harry B. Wassell, or his successor in the trust, to collect, receive and hold the said interest in said estate in trust for the uses and purposes and with the powers following:

In trust to pay over from time to time the net income therefrom unto the daughter of said Martha A. Given, Mrs. Nancy McFeely, for and during all the term of her natural life, without being subject to the debts, engagements or liabilities but freed and discharged therefrom, and without right of anticipation.

In trust upon the death of Mrs. Nancy McFeely before me to pay over the principal and any unexpended balance of any income therefrom to such of my heirs as shall then be designated by me in writing.

In trust upon the death of Mrs. Nancy McFeely after my death then to pay over the principal and any unexpended balance of any income thereof in the manner directed by me in my last Will and Testament, or if not so directed by me then to her nearest relative of my blood.

The said Harry B. Wassell as trustee or his successor in the trust shall have the power at any time to do all or any of the said things following:

(1) To sell and convert, at public or private sale, all or any part of the securities received from said estate, at such times, for such prices, and upon such terms as he shall deem proper, hereby giving him full

power and discretion with respect thereto; to execute all notes, bonds and other evidences of indebtedness, payable when, and containing such provisions as he may deem proper in order to extend or continue the indebtedness owing by the executors of said estate until he shall deem it wise to convert said interest in said estate into cash; to make and deliver deeds, bills of sale, assignments, or other assurances necessary to vest good and sufficient titles in the purchasers in and to the property which he may sell, without liability on the part of the purchasers to see to the proper application of the purchase money, but nothing herein contained shall be construed to be a direction to said trustee to sell or convert said interest in said estate, real, personal or mixed, or any part thereof, into cash until he shall deem it necessary and proper so to do, for the purposes of this trust.

(2) To hold and retain any investments received by him in distribution in kind from the said estate of Thomas Hartley Given, deceased.

(3) To invest and reinvest, alter, vary and change investments and reinvestments from time to time at discretion.

(4) To demand, receive, collect and receipt for all income arising out of said interest in said estate and investments made hereunder.

(5) In his discretion and without liability for any loss that may be incurred thereby, to act with the same powers over the trust property that he would possess were he the actual owner thereof, without being limited in holding or making investments to securities required for trustees under the laws of Pennsylvania, or any other of the United States of America.

In the event of the death or resignation of said Harry B. Wassell, the right is reserved by said Martha

A. Given, if then living, to select a successor trustee, or if after her death, then said Mrs. Nancy McFeely shall have the right to select a trust company as a successor trustee.

WITNESS the hand and seal of the said Martha A. Given, this twenty-third day of June, A. D. 1924.

(Signed) Mrs. Martha A. Given (SEAL)

Attest:

(Signed) James J. Murphy, Jr.
(Signed) Phyllis Zund, c/o American Consulate, Lucerne, Switzerland.

(25¢ Documentary Stamp cancelled 10/1/24 M.A.G.)

Confederation of Switzerland,
Canton and City of Lucerne,
Consulate of the United States of America. } :ss.

On this Twenty-third day of June, A. D. 1924, before me a Consul of the United States of America, in and for Lucerne, Switzerland, came the above named Martha A. Given, widow, and she acknowledged the foregoing indenture to be her act and deed to the end that it may be recorded as such.

WITNESS my hand and Seal of the Consulate of the United States of America at Lucerne in the Confederation of Switzerland. (Signed) James J. Murphy, Jr.

Seal of American Consulate, Lucerne, Switzerland.

Consul of the United States of America.

Service No. 273.
Fee $2.00
Francs 11. 60

American Consular Fee Stamp $2.00 cancelled "American Consulate, Jun 23 1924, Lucerne, Switzerland".

EXHIBIT NO. 2.

IN THE
ORPHANS' COURT OF ALLEGHENY COUNTY
STATE OF PENNSYLVANIA

ESTATE OF THOMAS HARTLEY GIVEN, Deceased.	No. 301 April Term, 1925 No. 594 September Term, 1923. AUDIT STATEMENT FOR DISTRIBUTION Testacy.

The statement of Arthur E. Braun and George C. Moore, executors of the Last Will and Testament of Thomas Hartley Given, deceased, respectfully represents:

(a) The decedent died June 28, 1919, testate, and at that time was domiciled in the United States, and resided in the City of Pittsburgh, County of Allegheny, Pennsylvania, and letters testamentary on his estate (a copy of same and the will being hereto attached marked Exhibit "A") were granted July 3, 1919.

Letters were advertised in the Pittsburgh Post and the Pittsburgh Legal Journal on the 26th day of July, the 2nd, 9th, 16th, 23rd and 30th days of August, 1919, respectively, and proofs of publication marked Exhibit "B" are hereto attached.

An inventory and supplemental inventory, copies of which are hereto attached and marked Exhibits "C" and "D", were filed in the office of the Register of Wills of Allegheny County on the 2nd day of August, 1919.

(b) Widow's exemption of $500.00 claimed.

(c) All creditors whose claims the accountants had notice or knowledge of before filing this account have been paid.

(d) The estate is subject to the payment of direct and collateral inheritance taxes to the State of Pennsylvania and the payment of Federal Inheritance Tax. All Federal taxes have been paid and substantially all state tax; but a balance claimed by the state is under negotiation which when ascertained, the Executors have ample funds to meet.

(e) Decedent was married at the time of his death. His widow, Martha A. Given, on the 3rd day of July, 1919, filed an election to take against the will, said election being recorded in the Recorder's Office of Allegheny County in Deed Book Vol. 2010, Page 193, and a copy of said election is hereto attached marked Exhibit "E".

(f) No children were born to decedent after the date of the will.

(g) There is no intestacy as to any part of the estate.

(h) The names of all persons having any interest in the estate as legatees, heirs or next of kin, are as follows:

Martha A. Given, widow, of full age.

Arthur E. Braun and George C. Moore, Trustees for Annie Given Kerr (life tenant), of full age;

Arthur E. Braun and George C. Moore (in remainder), of full age.

(i) All of said parties in interest are living.

(j) All parties other than creditors having an interest in the estate have had notice of the filing of this account.

(k) By agreement of all the parties in interest, the correct amount of income payable to Arthur E. Braun and George C. Moore, Trustees for Annie Given Kerr, is left open for adjudication upon the audit of the final account, and the payment and receipt of income heretofore made and made under this account is without prejudice to the rights of any party interested.

(l) The property to be distributed under this account consists of stocks, bonds and cash and the parties in interest have elected to accept the same in kind; an agreement in respect thereto executed by all the parties in interest is attached hereto, marked Exhibit "F". Under the said agreement, a portion of the securities and cash shown in this account shall be held by the executors and distribution thereof suspended until the filing of a final account.

(m) Partial distribution has been made to the parties in interest as shown by this account and a first and partial account filed at No. 594 September Term, 1923, for which credit is claimed.

(n) Certified copies of recorded assignments, purporting to be executed by Martha A. Given, assigning and transferring interests in her share of said estate, have been delivered to the accountants, viz: an assignment dated October 3, 1923, assigning and transferring ten per cent. (10%) of said interest to Harry B. Wassell, Trustee for Mrs. Elizabeth Kennedy Wheeler, now Elizabeth Kennedy Wheeler Lessinoff, an assignment dated June 23, 1924, assigning and transferring ten per cent. (10%) of said interest to Harry B. Wassell, Trustee for Nancy McFeely, and an assignment dated October 3, 1923, assigning and transferring ten per cent. (10%) of said interest to Harry B. Wassell in his own right. Copies of said instruments are hereto attached, marked Exhibits "G", "H" and "I".

WHEREFORE, your accountants ask that a distribution in kind be awarded to the persons entitled thereto, in accordance with Paragraphs (l) and (m) hereof.

(Signed) Arthur E. Braun
(Signed) George C. Moore
Executors of the Estate of Thomas Hartley Given, Deceased

Sworn and subscribed this
19th day of May, 1925.

(Signed) W. F. Aull,
Notary Public

My commission expires:
March 12, 1927

EXHIBIT NO. 3.

IN THE ORPHANS' COURT OF ALLEGHENY COUNTY, PENNSYLVANIA

In the matter of the ESTATE OF THOMAS HARTLEY GIVEN, Deceased.	No. 301 April Term, 1925. No. 594 Sept. Term, 1923.

DECREE

And now, to-wit, May 20th 1925, the accounts in this case having been filed and confirmed nisi, and having been examined by the Court, upon consideration thereof it is decreed that said accounts be confirmed absolutely, and it appearing that an agreement by the distributees has been filed providing for distribution of a portion of the fund in the hands of the Accountants, in kind, and distribution of the remainder to be suspended until the filing of a final account, it is ordered that the fund in the hands of the Accountants, to wit, $2,731,772.78, be paid in accordance with

the schedule of distribution hereto attached and made part hereof, unless exceptions be filed within ten days, or an appeal be taken herefrom within three weeks.

(Signed) Per Curiam

EXHIBIT NO. 4.

AGREEMENT

MADE AND ENTERED INTO by and between MARTHA A. GIVEN, of Pittsburgh, Pennsylvania, Donor, MRS. NANCY MCFEELY, of Latrobe, Pennsylvania, Donee, and MRS. NANCY MCFEELY, of Latrobe, Pennsylvania, Trustee.

WHEREAS, by assignment dated June 23rd, 1924, a copy of which is attached hereto, Martha A. Given conveyed to Harry B. Wassell, ten (10%) per cent. of all her right, title and interest in the Estate of Thomas Hartley Given, deceased, to be collected by the said Harry B. Wassell and held in trust for Mrs. Nancy McFeely under the terms and conditions set forth in said assignment, and

WHEREAS, the said Harry B. Wassell has presented his resignation as said Trustee and the said Martha A. Given has appointed Mrs. Nancy McFeely as his successor Trustee under the provisions of said instrument, copies of which resignation and appointment are hereto attached, and

WHEREAS, the said Martha A. Given, as the Donor, desires to give to the said Mrs. Nancy McFeely, in addition to the life interest already held by her in said trust, the absolute title and interest therein, and the

said Mrs. Nancy McFeely desires to acquire absolutely all said property in which she now has a life interest.

Now, Therefore, This Agreement Witnesseth: That for One ($1.00) Dollar and other good and valuable considerations, to her in hand paid by the said Mrs. Nancy McFeely, it is agreed by and between the parties hereto as follows:

The said Martha A. Given, as Donor, agrees to the termination of said trust and to the transfer and conveyance to Mrs. Nancy McFeely, the present holder of the life interest therein, of the absolute right, title, interest, property, claim and demand of, in and to the said ten (10%) per cent. interest in the Estate of Thomas Hartley Given, deceased, as and when collected for her by the said Harry B. Wassell, so that the said Mrs. Nancy McFeely shall then have and receive absolute title to said property, relieved of the conditions and provisions of said trust.

The said Mrs. Nancy McFeely, as Donee of said life interest and Trustee of said Trust estate, does hereby agree to the termination of said trust and to the transfer and conveyance to her absolutely of the said ten (10%) per cent. interest in the Estate of Thomas Hartley Given, deceased, as and when collected by the said Harry B. Wassell.

The parties hereto agree to indemnify and save harmless the said Harry B. Wassell, the former Trustee, of and from any and all liability whatsoever which may arise out of the termination of this trust and the transfer and delivery to the said Mrs. Nancy McFeely of the absolute title, interest and possession, of, in and to the said Trust property, in addition to the income therefrom to which she is entitled under said Trust.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this first day of August, A. D. 1925.

Witness:
A. M. Nevins (Sgd.)

(Sgd.) MRS. MARTHA A. GIVEN (SEAL)
Donor.

(Sgd.) MRS. NANCY McFEELY (SEAL)
Donee.

(Sgd.) MRS. NANCY McFEELY (SEAL)
Trustee.

STATE OF PENNSYLVANIA }
COUNTY OF ALLEGHENY } ss:

Before me, a Notary Public in and for said County and State, came the above named MARTHA A. GIVEN, and acknowledged the foregoing Agreement to be her act and deed, to the end that the same may be recorded as such.

WITNESS my hand and notarial seal this first day of August, A. D. 1925.

(Sgd.) LEO J. AARON
Notary Public
My commission expires March 2, 1929
(Notarial Seal)

EXHIBIT NO. 5.

KNOW ALL MEN BY THESE PRESENTS

THAT I, Harry B. Wassell, of Pittsburgh, Pennsylvania, do hereby resign as Trustee of the Estate created for Mrs. Nancy McFeely by assignment of Martha A. Given, dated June 23rd, 1924.

WITNESS my hand and seal this first day of August, A. D. 1925.
Witness:

(Signed) HARRY B. WASSELL (SEAL)
(Signed) LEO J. AARON

KNOW ALL MEN BY THESE PRESENTS

THAT I, Martha A. Given, Donor of the Trust Estate for Mrs. Nancy McFeely created by me by assignment dated June 23rd, 1924, to fill the vacancy caused by the resignation of Harry B. Wassell as Trustee thereunder, do hereby select and appoint Mrs. Nancy McFeely Trustee, as his successor, under the right reserved by me in said assignment.

WITNESS my hand and seal this first day of August, A. D. 1925.
Witness:

(Signed) MRS. MARTHA A. GIVEN (SEAL)
(Signed) A. M. Nevius

EXHIBIT NO. 6.

ABSTRACT FROM THIRD ACCOUNT (JULY 31, 1927)

Balace After Distribution (of May 20, 1925), Consists of:		
Stocks per Schedule "L"	699,422.22	
Bonds per Schedule "M"	405,875.00	
Notes Receivable per Schedule "N"	100.00	
Cash per Schedule "O"	233,711.71	
Total		1,339,108.93

SCHEDULE "L".

STOCKS OWNED ESTATE OF THOMAS HARTLEY GIVEN, DECEASED.

	Shares	Inventory Value Per Share	Total
American Window Glass Machine Company, Common	3,000	75.00	225,000.00
American Window Glass Machine Company, Preferred	2,000	85.00	170,000.00
Gulf Oil Corporation of Pennsylvania	4,000	31.25	125,000.00
International Devices Company	11,250	9.55	107,500.00
Radio Corporation of America "A", common	30,000	1.03	30,900
Radio Corporation of America "A", Preferred	2,000	2.05	4,100.00
Radio Corporation of America "A", Preferred Capital Stock held by Union Trust Company of Pittsburgh under agreement dated September 9, 1926 between Arthur E. Braun and George C. Moore, Executors Estate of Thomas Hartley Given, Deceased, Westinghouse Electric and Manufacturing Company, Farmers Deposit Trust Company, Arthur E. Braun and George C. Moore, Trustees Estate of Thomas Hartley Given, Deceased, Annie Given Kerr, life tenant, Arthur E. Braun and George C. Moore, remaindermen, and Martha A. Given and joined in by Elizabeth K. Lessinoff, Nancy K. McFeely and Harry B. Wassell	18,000	2.05	36,922.22
Total			699,422.22

SCHEDULE "M".

BONDS OWNED.

United States Third Liberty Loan 4¼%	405,875.00

SCHEDULE "N".

NOTES RECEIVABLE.

N. E. Wycoff	100.00

SCHEDULE "O".

CASH.

Farmers Deposit National Bank	233,711.71

EXHIBIT NO. 7.

IN THE ORPHANS' COURT OF ALLEGHENY COUNTY, PENNSYLVANIA

In the Matter of the ESTATE OF THOMAS HARTLEY GIVEN, Deceased.	No. 84 October Term, 1927 No. 301 April Term, 1925 No. 594 September Term, 1923

DECREE

And now, to wit, November 3, 1927, the Accounts in this case having been filed and confirmed nisi, and having been examined by the Court, upon consideration thereof, it is decreed that said Accounts be confirmed absolutely, and it appearing that a Petition by the distributees has been filed providing for distribution of a portion of the fund in the hands of the Accountants, in kind, and distribution of the remainder to be suspended until the filing of a final Account, it is ordered that the funds in the hands of the Accountants, to wit, $617,111.71, be paid in accordance with the Schedule of Distribution hereto attached and made a part hereof, unless exceptions be filed within ten (10) days, or an appeal be taken herefrom within three (3) weeks.

(Signed) Per Curiam

PRÆCIPE FOR RECORD.

(Filed June 12, 1934.)

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, with reference to petition for review heretofore filed in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

(3) The findings of fact and opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review filed by the petitioner in the above cause.

(6) Stipulation of facts with Exhibits Nos. 1 to 7.

(7) This præcipe.

H. B. WASSELL,
Counsel for Petitioner.
3106 Grant Building,
Pittsburgh, Penna.

CERTIFICATE.

I, B. D. GAMBLE, clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 48, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the præcipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this second day of July, 1934.

B. D. GAMBLE,
(Seal) *Clerk, United States Board of Tax Appeals.*

[fol. 56] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5545

NANCY K. McFEELY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

And afterwards, to wit, the third day of October, 1934 come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley and Honorable J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the tenth day of December, 1934 come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 57] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5545

NANCY K. McFEELY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Before Buffington, Woolley and Davis, Circuit Judges

Per CURIAM:

This case depends on its own particular facts and as no precedent or principle is involved and we find ourselves in accord with the action of the Tax Board, we limit ourselves to affirmance of its order.

Endorsements: Opinion Per Curiam. Rec'd & Filed Dec. 10, 1934. Wm. P. Rowland, Clerk.

[fol. 58] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5545

NANCY K. McFEELY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby affirmed.

Philadelphia, December 10, 1934.

Per CURIAM:

Buffington, Circuit Judge.

Endorsements: Order Affirming Decree. Rec'd & Filed Dec. 10, 1934. Wm. P. Rowland, Clerk.